IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

PERRY A. MARCH, in his capacity as the father of SAMSON LEO MARCH and TZIPORA JOSETTE MARCH, both minor children,	)	
Petitioner,	)	**Case No. 3:00-0736**
	)	**JUDGE TRAUGER**
v.	)	
LAWRENCE E. LEVINE and CAROLYN R. LEVINE,	)	
Respondents.	)	

MEMORANDUM

Pending before the court is the petitioner's Motion to Determine a Sum Certain Amount as to the Court's Prior Award of Attorney's Fees (Docket No. 155), to which the respondents have responded (Docket No. 170), the petitioner has replied (Docket No. 190), and the respondents have filed a surreply (Docket No. 192). For the reasons stated herein, the petitioner's motion will be granted, and the petitioner will be awarded attorney's fees in the amount of $104,839.50, less a set off of $43,169.06 in favor of the respondents.

On October 4, 2000, the court entered an Order granting the petitioner's motion for summary judgment and denying the respondents' motion for summary judgment on the petitioner's petition for the return of his children to Mexico pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, as implemented in the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601, *et seq.* *March v. Levine*, 136 F.Supp.2d 831 (M.D. Tenn. 2000). In the Memorandum accompanying this Order, the court stated, "As mandated by 42 U.S.C.A. § 11607(b)(3), the respondents are ordered to pay all costs

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associated with the return of the children to Mexico, court costs and March's reasonable attorney's fees." *Id.* at 861. The court's decision was affirmed by the Sixth Circuit on April 19, 2001, *March v. Levine*, 249 F.3d 462 (6th Cir. 2001), *reh'g denied* (July 9, 2001), and the United States Supreme Court denied the respondents' petition for a writ of certiorari on January 7, 2002 (Docket No. 154).

On January 28, 2002, the petitioner filed the instant motion to determine reasonable attorney's fees,[1] requesting total fees of more than $470,367.[2] This request was later supplemented with the claim for fees of two Mexican counsel in the total amount of $50,000. (Docket No. 177, Declaration of Ismael Gandara Mota, para. 6; Docket No. 178, Declaration of Joaquin Rivera de Avila, para. 17) The petitioner relies on the court's October 4, 2000 Order and 42 U.S.C. § 11607(b)(3) as the bases for this motion. Section 11607(b)(3) provides:

> Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

As an initial matter, the respondents argue that the award of attorney's fees in this case would be clearly inappropriate. The petitioner argues that the respondents have waived any

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[1]By Order of October 27, 2000, the court extended the time for filing an application for an award of fees until 20 days after the conclusion of all appeals. (Docket Nos. 137, 151)

[2]The petitioner requests compensation for 486.6 hours of Mr. Herbison's time at a rate of $270 per hour and for 753.3 hours of Mr. Catz's time at a rate of $450 per hour, which totals $470,367. (Docket No. 155 at 2; Docket No. 156, Declaration of John E. Herbison, attach.; Docket No. 155, attach., Declaration of Robert S. Catz, attach., Ex. C) The petitioner then requests an upward adjustment to this amount in light of the *Johnson* factors, discussed *infra*. (Docket No. 155 at 2)

objection to the award of fees, other than to the amount, because they did not appeal the district court's award of reasonable attorney's fees in the October 4, 2000 Order. (Docket No. 157 at 2-3) The respondents argue that, under the Local Rules, objections to the award of fees are not appropriate until after the fee request has been made. (Docket No. 170 at 1-2)

The court need not dwell on this issue. Whether the respondents' arguments are considered as claims that the requested fees are "clearly inappropriate" under Section 11607(b)(3) or that the requested fees are not "reasonable" under the common analysis for a fee request is a distinction without a difference. *See Distler v. Distler*, 26 F.Supp.2d 723, 727 (D. N.J. 1998) (applying lodestar approach to determination of fees under the ICARA); *Freier v. Freier*, 985 F.Supp. 710, 712 (E.D. Mich. 1997) (same). In its October 4, 2000 Order, the court awarded the petitioner "reasonable attorney's fees." *See March*, 136 F.Supp.2d at 861. The respondents' arguments are related to a determination of reasonable fees and will be considered as such.

The parties agree that it is appropriate to use the standard lodestar method of calculating reasonable attorney's fees in this case. (Docket No. 157 at 3; Docket No. 170 at 3) As the Supreme Court has stated, "the 'most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" *Webb v. Board of Educ. of Dyer Co., Tennessee*, 471 U.S. 234, 242, 105 S.Ct. 1923, 1928, 85 L.Ed.2d 233 (1985) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983)). "There is a 'strong presumption' that this lodestar figure represents a reasonable fee." *Building Service Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1401 (6th Cir. 1995) (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92

L.Ed.2d 439 (1986)).

"The party seeking attorneys fees bears the burden of documenting [her] entitlement to the award," *Reed v. Rhodes*, 179 F.3d 453, 472 (6th Cir. 1999), and "should submit evidence supporting the hours worked and rates claimed." *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939; *see also Woolridge*, 898 F.2d at 1177. "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939.

The court also must determine that the hours expended on the litigation were "reasonable." As the Supreme Court stated:

> The district court also should exclude from this initial fee calculation hours that were not 'reasonably expended.' S. Rep. No. 94-1011, p.6 (1976). Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. 'In the private sector, "billing judgment" is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.' *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc) (emphasis in original).

Hensley, 461 U.S. at 434, 103 S.Ct. at 1939-40.

In determining the reasonable rate, the court should consider the prevailing market rate in this area for lawyers of comparable experience and expertise, regardless of whether the attorneys in the case primarily practice in the Middle District of Tennessee. As the Sixth Circuit has found, "hourly rates for fee awards should not exceed the market rates necessary to encourage competent lawyers to undertake the representation in question." *Coulter v. State of Tennessee*, 805 F.2d 146, 149 (6th Cir. 1986).

After determining the lodestar amount, the court may adjust the fees upward or

downward based on a number of considerations. Many of these factors were established by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds*, *Blanchard v. Bergeron*, 489 U.S. 87, 107 S.Ct. 939, 103 L.Ed.2d 67 (1989), and adopted by the Supreme Court in *Hensley*. 461 U.S. at 434 n.9, 103 S.Ct. at 1940 n.9. As noted by the Sixth Circuit, the *Johnson* factors are:

(1) the time and labor required by a given case;
(2) the novelty and difficulty of the questions presented;
(3) the skill needed to perform the legal service properly;
(4) the preclusion of employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the 'undesireability' of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

Reed, 179 F.3d at 471 n.3 (citing *Johnson*, 488 F.2d at 717-19).

The federal courts have found that the *Johnson* factors also may be used to assist the court in determining a reasonable number of hours and a reasonable rate for the representation. *See Hensley*, 461 U.S. at 434 n.9, 103 S.Ct. at 1940 n.9; *see also Adcock-Ladd*, 227 F.3d at 349 & n.8 (finding that the court may consider these factors "in determining the basic lodestar fee and/or adjustments thereto"); *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993) (finding that a court may "consider the factors announced in *Johnson* . . . when analyzing the reasonableness of the hours expended and the hourly rate requested").

The petitioner argues that a reasonable rate for his counsel is $450 per hour for Robert Catz and $270 per hour for John Herbison. (Docket No. 155 at 2) The petitioner has submitted

time records requesting compensation for 753.3 hours of work by Mr. Catz and 486.6 hours of work by Mr. Herbison. (Docket No. 155, attach., Declaration of Robert S. Catz, attach., Ex. C; Docket No. 156, Declaration of John E. Herbison, attach., Ex. 1) The petitioner also requests an upward adjustment of the lodestar amount pursuant to several of the *Johnson* factors. (Docket No. 157 at 5-9)

Subsequent to his initial motion, the petitioner requested and was granted leave to submit declarations of two Mexican attorneys who claim to have worked on the petitioner's claims. (Docket No. 175; Docket No. 176) Joaquin Rivera de Avila states that he worked in excess of 200 hours on matters related to this case. (Docket No. 178, Declaration of Joaquin Rivera de Avila, para. 19) Senor Rivera further states that he reached an agreement with the petitioner to represent him for a flat fee of $30,000, which is his usual practice, and that, when he does charge an hourly rate, it is approximately $95 per hour. *Id.*, para. 6. Senor Rivera later agreed to reduce his fee to $20,000, although he requests an award of $30,000 from this court. *Id.*, para. 17. The petitioner paid Senor Rivera $2,500 in advance. *Id.*, para. 6. Ismael Gandara Mota states that he and his partner, Lic. Luis Alfaro Reyes, spent well in excess of 200 hours on this case for a flat fee of $20,000. (Docket No. 177, Declaration of Ismael Gandara Mota, paras. 6, 19) Again, Senor Gandara stated that a flat fee arrangement is his standard practice, and his hourly rate would be approximately $105 per hour. *Id.*, para. 6. Senor Gandara received a retainer from the petitioner in the amount of $1,500. *Id.* Neither Senor Gandara nor Senor Rivera maintained contemporaneous time records (Docket No. 177, Gandara Decl., para. 18; Docket No. 178, Rivera Decl., para. 19), and neither has submitted any detailed time records to the court.

The respondents object to the petitioner's requested fees on a number of grounds: (1) counsel's actions with regard to the request for an award of attorney's fees are unprofessional

and in violation of the Tennessee Code of Professional Responsibility; (2) the petitioner's request, in part, is improperly punitive in nature; (3) the petitioner drafted some, if not all, of his own legal briefs; (4) the requests by Senor Gandara and Senor Rivera are untimely, do not relate to services necessary to this litigation, and are unsupported both as to the hours expended and the requested rate; (5) counsel failed to keep contemporaneous time records; (6) counsel failed to exercise billing judgment; (7) the recorded hours are excessive and duplicative; and (8) the recorded hours are not supported by adequate detail to determine reasonableness. In addition, the respondents object to any upward adjustment of the lodestar amount and request a set off of any award against their prior judgments against the petitioner in the Tennessee and Illinois state courts.

The first four objections raised by the respondents must be addressed as threshold considerations. The remaining arguments will be addressed within the context of a determination of the lodestar amount. The court will then consider whether the lodestar amount should be adjusted and whether the respondents are entitled to a set off of any amount awarded to the petitioner.

1. Unprofessional Conduct

The respondents allege that petitioner's counsel's conduct in soliciting business is in violation of EC 2-3, DR 2-104(B)(1), DR 2-106, and EC 1-5 of the Tennessee Code of Professional Responsibility,[3] which justifies the denial of all fees in this matter. (Docket No. 170

[3]As stated in Local Rule 1(e)(4), "[t]he standard of professional conduct of the members of the bar of this Court shall include the current Tennessee Code of Professional Responsibility, Tenn. S. Ct. R. 8. A violation of any of the disciplinary rules contained in the Code in connection with any matter pending before this Court shall subject the offending attorney to appropriate disciplinary action."

at 5-8; Docket No. 192 at 4)

Ethical Consideration 2-3 states,

> Whether a lawyer acts properly in volunteering in-person advice to a layperson to seek legal services depends upon the circumstances . . . . The advice is proper only if motivated by a desire to protect one who does not recognize the presence of a legal problem or who is ignorant of the existence of legal rights or obligations. It is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause legal action to be taken merely to harass or injure another. A lawyer should not initiate an in-person contact with a non-client, personally or through a representative, for the purpose of being retained to represent that non-client for compensation.

Tenn. S. Ct. R. 8, EC 2-3. The related disciplinary rule, DR 2-104(B)(1) states,

> Except as provided herein, a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain; nor shall a lawyer permit employees or agents of the lawyer to solicit on the lawyer's behalf; nor shall a lawyer enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule.

Tenn. S. Ct. R. 8, DR 2-104(B)(1).

The respondents allege that the declaration of Mr. March establishes that Mr. Catz solicited his business, in violation of this Ethical Consideration and Disciplinary Rule. (Docket No. 170 at 5) The cited paragraphs of Mr. March's declaration state as follows:

> 17. At about this same time [in approximately July 2000], my Chicago attorney, Vincent Stark, put me in contact with Mr. Robert Catz, Esq. Mr. Catz had called Mr. Stark from Nashville after seeing my plight on television on June 23, 2000. After initial discussions with Mr. Stark, Mr. Catz and I spoke directly by telephone.
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> 18. Over the course of a few days and numerous long telephone calls, I learned that Mr. Catz was a highly experienced federal court litigator, with a background in the law which, frankly, astounded me. Mr. Catz suggested that he fly to me in Mexico, and we could consult over my children's case in person.

(Docket No. 155, attach., Declaration of Perry A. March, paras. 17-18)

These paragraphs do not indicate whether Mr. Catz or Mr. March placed the initial phone call between them. However, if Mr. Catz "solicited" business, he did so through Mr. Stark, Mr. March's legal counsel, who put Mr. Catz in touch with Mr. March.[4] There is no proof in the record that Mr. Catz had any of the disapproved motives set out in EC 2-3 or DR 2-104(B)(1). More importantly, respondents have provided no authority to support their proposition that, if Mr. Catz did run afoul of disciplinary rules, he has forfeited his right to be compensated for his work. The normal sanction for such conduct would be disciplinary action by the appropriate Board of Professional Responsibility.

The respondents have failed to establish that Mr. Catz violated these ethical principles or, even if he had, that the denial of fees is the proper remedy. Therefore, fees will not be denied on this basis.

The respondents also allege that Mr. Catz has charged an excessive fee, in violation of DR 2-106, which states that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Tenn. S. Ct. R. 8, DR 2-106(A). The record indicates that Mr. Catz has not charged the petitioner any fee to date. (Docket No. 155, attach., Catz Decl., para. 2) The fee request by the petitioner does not indicate that he has been or will be charged these fees, should his request be denied in whole or in part. Therefore, the respondents have not established a violation of DR 2-106.

Finally, the respondents argue that Mr. Catz and Mr. Herbison have violated EC 1-5 in

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[4]The "or through a representative" language in EC 2-3 presumably refers to the lawyer's soliciting business through his own agent or representative, not through the prospective client's legal counsel.

their submissions relating to the petitioner's request for an award of fees. (Docket No. 192 at 4 & n.8) EC 1-5 cautions that

> [a] lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. Lawyers should be temperate and dignified, and should refrain from all illegal and morally reprehensible conduct . . . .

Tenn. S. Ct. R. 8, EC 1-5. Again, respondents have failed to provide any authority that a lawyer who violates an ethical guideline forfeits his compensation. Therefore, any intemperate or undignified remarks made in the filings by the petitioner do not give rise to a denial of fees.

2. Punitive Award

The respondents justifiably object to the petitioner's fee request to the extent that it is based on a desire to punish the respondents. In his motion, the petitioner argues that deterrence and punishment are proper considerations. (Docket No. 157 at 8-9) The petitioner argues that "[i]f Mr. and Mrs. Levine must pay significant attorney[']s [fees], others who may contemplate snatching children across international borders will likely hesitate before carrying out such a crime." *Id.* at 8. Further, the petitioner claims that "it is now time for Mr. and Mrs. Levine to pay the piper," and "there is a need to punish the Respondent evildoers." *Id.* at 9. Finally, the petitioner argues that "[t]hese miscreants deserve to pay, and they deserve to pay big time." *Id.*

The petitioner's argument, besides being unprofessional and needlessly vicious, is entirely without merit. Although the petitioner correctly notes that the ICARA allows for a consideration of the respondents' ability to pay an award of attorney's fees, there is nothing in that statute to indicate that a wealthy respondent should be required to pay more than a reasonable amount. As discussed previously, an award of attorney's fees should reflect the amount necessary to encourage competent lawyers in this jurisdiction to undertake the

representation, without resulting in a windfall for the attorneys. The court rejects petitioner's contention that "punishment" has any role in the determination of reasonable fees in this case.

3. Petitioner's Own Work

The respondents object to the payment of fees on the ground that "the declarations of Mr. Herbison and Mr. March give rise to the inference that Mr. March was intimately involved with writing the legal work for which compensation is sought," and that Section 11607(b)(3) does not provide that parties are to be compensated for their time. (Docket No. 170 at 10) The respondents rely, in part, on Mr. Herbison's response to a question raised in oral argument before the Tennessee Court of Appeals in a separate action involving Mr. March. Based on its own review of the tape recorded transcript,[5] the following exchange took place between a judge and Mr. Herbison:

> Judge: Was the pleading that was stricken drafted by counsel –
> Mr. Herbison: It was.
> Judge: – or by your client?
> Mr. Herbison: It was drafted – well, he was – I, in candor, I don't know who drafted the pleading. It was signed by counsel. My experience with Mr. March is that he drafts a lot of his own work, but – not in the cases I've been involved – but he frequently docs that. But it was signed and submitted to the court by counsel.

(Docket No. 170, attach., Ex. D, Oral Transcript)

The respondents argue that, "[w]ith the oral concession by Mr. Herbison that Mr. March is the author of his own legal work, it is material that there has been no submission to verify that the work for which compensation is sought is not that of the Petitioner." (Docket No. 170 at 10-11)

In his reply, the petitioner clearly states that "the work submitted to this Court was the

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[5]According to the respondents, who submitted the tape, no written transcript was available. (Docket No. 170 at 10 n.46)

product of counsel of record." (Docket No. 190 at 15) In support, the petitioner submits the supplemental declaration of Mr. Herbison, wherein he states that "[t]he complaint submitted to the Court . . . is my work and mine alone, as are all other documents prepared by me in this case." (Docket No. 191, Supplemental Declaration of John E. Herbison, para. 7) On the basis of this statement, the respondents then argue that "[a]ccepting that representation as true requires this Court to find that nearly all of the claimed substantive work by Mr. Catz was unnecessary and not properly compensable . . . ." (Docket No. 192 at 5)

This objection lacks merit. The statement made to the Tennessee Court of Appeals does not provide a sufficient basis to conclude that Mr. March drafted any, much less all, of his own submissions in the case before this court. Although Mr. Herbison was unwilling to state affirmatively that Mr. March, who is an attorney, had never prepared his own documents, Mr. Herbison did state that it had not happened in cases in which he was involved as counsel.

As for the implications of Mr. Herbison's supplemental declaration, he limited his assertion of authorship to "documents prepared by [him] in this case." (Docket No. 191, Herbison Supp. Decl., para. 7) There is nothing in this statement to indicate that Mr. Catz's work was "unnecessary and not properly compensable." According to his time sheet, Mr. Catz drafted the motion for a temporary restraining order (Docket No. 31) and the motion to strike certain affirmative defenses (Docket No. 69). The first of these is signed by both Mr. Catz and Mr. Herbison, and the second is signed by Mr. Catz alone. Thus, Mr. Herbison did not take credit for the preparation of these motions, and his supplemental declaration does not imply authorship of them.

Although the petitioner would not be entitled to recover fees for work done by him, there is no evidence that he has sought recovery for any such work. Hence, the respondents' objection

to the award of attorney's fees on this basis will be overruled.

4. Mexican Counsel's Request

Subsequent to his initial motion for an award of attorney's fees, the petitioner, with leave of the court, submitted declarations from counsel located in Mexico attesting to legal fees incurred on behalf of the petitioner and seeking recovery for those fees. (Docket No. 177, Gandara Decl.; Docket No. 178, Rivera Decl.) The respondents object to the award of any fees for these attorneys because the request is untimely, the petitioner has not established that the work done by these attorneys was necessary to his ICARA litigation, and the attorneys have not submitted documented records of the time spent on their representation of the petitioner. (Docket No. 192 at 9-13)

Pursuant to this court's Order, the petitioner was allowed until twenty days after the denial of the petition for a writ of *certiorari* to the United States Supreme Court to submit a request for an award of attorney's fees. (Docket Nos. 137, 151) The Supreme Court denied the respondents' petition on January 7, 2002, and the denial was docketed in this court on January 23, 2002. (Docket No. 154) The petitioner filed his request for attorney's fees in a specific amount on January 28, 2002. (Docket No. 155) The petitioner did not file his motion for leave to submit the declarations of Senor Gandara and Senor Rivera until March 8, 2002. (Docket No. 175)

Clearly, these declarations were submitted well after the deadline set by the court. The petitioner offers no explanation for the delay. Both Senor Gandara and Senor Rivera "apologize to the Court for the delay in getting this instrument to the Court" and state that, because "this was a novel and complex Petition," they "first reviewed the Petitions of Mr. March's US lawyers to understand these rules better and to know the form this must take." (Docket No. 177, Gandara

Decl., para. 2; Docket No. 178, Rivera Decl., para. 2) There is no excuse for the petitioner or his counsel not to have informed these lawyers of the requirements and deadlines for submitting a request for an award of fees. The supplemental request must be denied as untimely. *See Pesin v. Rodriguez*, 244 F.3d 1250, 1253 (11th Cir. 2001) (affirming denial of fees under the ICARA as untimely).

In addition, as the respondents argue, Senor Gandara and Senor Rivera have not submitted the necessary documentation and support for their requests. Their declarations are insufficient to establish that the work done in Mexico on behalf of Mr. March, even if related to his overall efforts to recover his children, were necessary to this litigation under the ICARA. Moreover, the declarations do not provide sufficient information regarding the tasks performed and the time spent on these tasks for the court to determine a reasonable number of hours for these attorneys to have spent on this work. For all of these reasons, the court cannot award the petitioner any fees for the work performed by Senor Gandara and Senor Rivera.

5. Lodestar Amount

In order to calculate the lodestar amount, the court must determine the reasonable number of hours expended on this litigation and a reasonable hourly rate for Mr. Catz and Mr. Herbison. As discussed previously, the petitioner bears the burden of proof on both issues.

A. Reasonable Number of Hours

According to their time sheets, Mr. Catz spent 753.3 hours on this case, and Mr. Herbison spent 486.6, for a total of 1,239.9 hours. By comparison, the respondents' lawyers recorded a total of 511.45 hours of work from August 4, 2000 through October 5, 2001, substantially less

than half of the time claimed by petitioner's counsel.[6] (Docket No. 174, Affidavit of Gregory D. Smith, attach., Ex. 1) Mr. Herbison did not maintain contemporaneous time records, so he has had to reconstruct his time for purposes of this petition. (Docket No. 156, Herbison Decl., paras. 13-14)

The respondents object to a number of the entries of both counsel as vague, unsupported, duplicative, and excessive. Mr. Catz's time records include 57.6 hours of "Fact Devlmnt./doc rev./legal research," 54.6 hours of "R/W re: ICARA/Prov. Remedies," 18.1 hours of "R/W Temp. Restraining Order" and "Finalize and File TRO," and more than 24.8 hours of "R/W Motion to Strike Defense Re: Standing."[7] (Docket No. 155, Catz Decl., attach., Ex. C) Mr. Catz's entries also include 100.4 hours entitled simply "Meeting with J. Herbison" and 20.1 hours entitled "TC with J. Herbison."[8] None of the entries reveals the subject matter discussed during these meetings and calls.

Mr. Herbison's entries are equally vague. Presumably due to the reconstructed nature of the records, Mr. Herbison does not divide his time other than by the day. Hence, it is impossible to tell how much of a given day was spent on each listed task. Several times, entries contain "meeting w/R. Catz" along with the "review" of other items. The times recorded for these events generally do not coincide with the time recorded by Mr. Catz for meetings with Mr. Herbison.

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[6]Respondents' counsel recorded their time in quarter-hour increments, while petitioners' counsel used tenths of hours on their time sheets. In the court's experience, the use of quarter-hour increments usually results in a slightly higher total for time expended, since a six-minute phone call will usually be recorded as a quarter hour.

[7]Mr. Catz does not explain his abbreviations. At times, "R/W" appears to stand for "Research/Write," but that does not seem appropriate to all entries. Similarly, "Rev." appears to stand for both "Revise" and "Review," and it is often unclear which meaning is proper.

[8]"TC" is interpreted as "Telephone Conference."

As a result, it is not clear whether Mr. Catz and Mr. Herbison reviewed the listed documents during their meeting, or Mr. Herbison engaged in these tasks separate from his meeting with Mr. Catz.

What is clear from the submitted records is that both Mr. Catz and Mr. Herbison devoted significant time to researching an area of the law that was unfamiliar to them and spent a great deal of time assisting one another and reviewing each other's work. Although some collaboration and review is reasonable, the respondents properly object to much of this time as duplicative and excessive. Therefore, after discussing other, specific objections to the recorded hours, the court will reduce the number of hours to compensate for the duplicative, excessive, and unsupported entries.

The respondents also object to compensating Mr. Catz and Mr. Herbison for travel time. Mr. Catz made several trips to Jalisco, Mexico to meet with Mr. March. From his records, it appears that Mr. Catz performed no work during his travel time but seeks compensation at his full rate for all of this travel time, amounting to 64.5 hours. Mr. Catz also seeks compensation for 46.2 hours of travel for 21 trips between his home in Cadiz, Kentucky and Nashville, Tennessee. Mr. Herbison also seeks compensation for two trips to Jalisco, Mexico, totaling 45.5 hours, 10.0 of which reflect no other work being performed by Mr. Herbison.

The respondents claim that the repeated trips to Mexico to meet with Mr. March are not reasonably related to this litigation. The court cannot find it unreasonable for counsel to meet with their client in person on some occasions, especially where the petitioner's claim was dependent on his ability to establish Mexico as the habitual residence of his children. However, it is not clear that Mr. Catz needed to be working on this case in Mexico from October 24, 2000 (three weeks after this court issued its decision granting the petitioner's motion for summary

judgment and while the case was on appeal to the Sixth Circuit) through November 19, 2000. During this trip, Mr. Catz recorded no time spent on this case on either October 30 or from November 8 until November 17, and he recorded 3.1 hours of work or less – most of which was "meeting with P. March" – on 10 of the remaining days. As is the case with his previous trips, Mr. Catz does not indicate the nature or purpose of his meetings with Mr. March. During this trip, Mr. Catz records 41.5 hours of meetings with Mr. March and 5.4 hours of meetings with Mr. March's father. Because the petitioner has not established the reasonableness of this trip or its necessity to this litigation, compensation for the travel to and time spent in Mexico on this trip will be denied. As discussed, *infra*, 11.8 hours represent compensable paralegal time and will be compensable at the proper rate. Additionally, 7.9 hours relate to legal research regarding the appeal and are compensable. Hence, Mr. Catz's compensable time spent on this case will be reduced by 69.5 hours from his recorded amount.

With regard to Mr. Catz's trips between Cadiz, Kentucky and Nashville, Tennessee, the petitioner has offered no explanation for the necessity of 21 trips in the six months from July 11, 2000 through January 19, 2001. Four of these trips surround Mr. Catz's first two trips to Mexico, and they will be compensated at the same rate as the rest of his travel time to Mexico. The visit from August 2, 2000 through August 5, 2000 is reasonable in light of the fact that the petitioner filed this action on August 3, 2000. Between August 29, 2000 and September 8, 2000, Mr. Catz records four one-way trips, either to or from Nashville (inexplicably leaving off the other "leg"). Mr. Catz returns to Nashville on September 12, 2000 and again on September 22, 2000. He appears to stay in Nashville from September 22 through October 2, 2000. The tasks performed between August 29 and September 22 involve mainly telephone conferences with Mr. Herbison and Mr. March, and the review/revision of several documents. The docket sheet shows

that much was happening in this case at that time, and it is understandable that Mr. Catz and Mr. Herbison would be conferring and strategizing with each other and with their client. However, in this electronic age of fax machines, word processors, and e-mail, not to mention the telephone conference call, Mr. Catz's physical presence in Nashville on these many occasions can hardly be justified. Moreover, petitioner chose to add to his team an out-of-state lawyer, and most of the travel expense to get him to and from Nashville, where not one court appearance demanded his presence, must fall to Mr. March.

Compensation will be awarded for two round trips between Cadiz and Nashville during this period, including the trip from August 2 through August 5. The petitioner has not established the reasonableness or necessity of the remaining trips, and compensation for those trips will be denied. The remaining trips occurred after this court's decision on summary judgment, while the case was pending before the Sixth Circuit in Cincinnati, Ohio. The petitioner also has failed to establish the necessity and reasonableness of these trips, and compensation for them will be denied. Hence, Mr. Catz's recorded time will be reduced by 28.6 hours for these excessive trips.

As the respondents argue, it is not the standard practice in this jurisdiction to compensate attorneys at their full rate for travel time where no other work is performed. Therefore, for the 61.2 hours of Mr. Catz's compensable travel time and the 10 hours of Mr. Herbison's travel time where no other work is recorded, the petitioner will be entitled to recover fees at one-half of the attorney's reasonable rate.

The respondents also object to compensating both attorneys for travel to and from Cincinnati and for attendance at the oral argument before the Sixth Circuit. Mr. Catz, who did not participate in the oral argument, records 11.6 hours of travel time and 4.7 hours for his

attendance at the oral argument.[9] Mr. Herbison records 14.2 hours for his travel to and from Cincinnati and for his attendance at the oral argument. Although he includes "review of response in opposition to motion to dissolve stay" as part of his 5.7 hours of travel to Cincinnati, this work amounted to no more than an incidental portion of that time.[10] Mr. Herbison represented the petitioner at the oral argument of this case. The petitioner has not established the reasonableness and necessity of Mr. Catz's attendance at the oral argument, and compensation for his travel and attendance will be denied. As for Mr. Herbison, 11.4 hours will be compensable at one-half of his reasonable rate as travel time, and the remaining 2.8 hours will be compensable at his full rate for attendance at the oral argument.

The respondents also object to entries involving clerical or administrative tasks that could have been performed by paralegals or other administrative personnel. Mr. Catz records the following entries:

8.2 hours for "News Archive/Review;"
3.1 hours for "Rev. 1997 Nashville Scene two parts;"
3.7 hours for "Rev. Probate Court Record;"
5.7 hours for "Xerox and abstract cases;"
6.4 hours for "Rev/Copy Cases @ NSL;"
7.1 hours for "Rev/Copy of cases @ Murray State L.;"
4.1 hours for "TC with CA6 Mary Patterson;"
7.1 hours for "Organize entire pleadings file for appeal;"
4.7 hours for "Orgnz/Atty. Fees records/phone logs/bill;" and
15.6 hours for "Rev/copy cases @ Murray St.."

Mr. Herbison also records 2.5 hours for "review of media articles regarding Janet March

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[9]The respondents also claim that "Robert Catz, who did not participate in the oral argument of this case, had another case on the same day before the Sixth Circuit Court of Appeals, which he neglected to mention in the time sheets submitted to this court." (Docket No. 170 at 14)

[10]Mr. Catz recorded only 6 minutes of time devoted to the review of this document. (Docket No. 155, Catz Decl., attach., Ex. C)

disappearance." The respondents introduced evidence that their attorneys billed for paralegal work at a rate of $75-85 per hour. (Docket No. 174, Smith Aff., para. 5. Based on the court's experience in prior cases and in private practice, this is within the range of rates charged in this jurisdiction for paralegal work. For the hours found compensable in this category, the reasonable rate of $75 per hour will apply.

To summarize, Mr. Catz's compensable hours will be reduced by 123.2 hours for the third trip to Mexico and the trip to Cincinnati and for the work that will be billed at a paralegal rate. In addition, 61.2 hours of Mr. Catz's time will be compensable at one-half of his reasonable rate as travel time where no other work was performed. Similarly, 21.4 hours of Mr. Herbison's time will be compensable at one-half of his reasonable rate for travel to Mexico and to Cincinnati where no other work was performed, and his remaining hours will be reduced by 2.5 hours as paralegal time. This leaves 568.9 hours of recorded time for Mr. Catz at his full rate, and 462.7 hours of recorded time for Mr. Herbison at his full rate.

What remains to be considered are the court's concerns with the duplicative entries, the excessive time devoted to many tasks, and the failure of counsel to submit detailed – and in the case of Mr. Herbison, contemporaneous – records. Although it is clear that this case involved time pressures and required a significant effort from counsel, there is no excuse for not maintaining contemporaneous time records, and hours which are "excessive, redundant, or otherwise unnecessary" should be excluded. *Hensley*, 461 U.S. at 434, 103 S.Ct. at 1939-40. *Hensley* also provides that "[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly." *Id.*, at 433, 103 S.Ct. at 1939. As noted, the respondents have submitted the time sheets for their own counsel. From August 4, 2000 through October 5, 2001, respondents' counsel recorded 511.45 hours of time on this case. (Docket No. 174, Smith

Aff., attach., Ex. 1)

In light of the failure of the petitioner to submit well-documented evidence of the time spent on this case, the clearly excessive time devoted to some tasks, and the apparent duplication of effort by counsel, the court will reduce the total compensable hours by 40%.[11] Although this is a substantial reduction, it results in a number of hours comparable to that spent by respondents' counsel who engaged in comparable tasks and is a reasonable number of hours to have devoted to this case. The petitioner has failed to establish the necessity or reasonableness of hours in excess of this number. Therefore, the court finds that a reasonable number of hours of work for counsel to have spent on this case is 341.34 hours by Mr. Catz and 277.62 hours by Mr. Herbison. In addition, Mr. Catz is entitled to 36.72 hours of travel time at one-half his reasonable rate, and Mr. Herbison is entitled to 12.84 hours of travel time at one-half his reasonable rate. Finally, the petitioner is entitled to recover for 40.92 hours of paralegal time at a rate of $75 per hour.

B. Reasonable Hourly Rates

In order to calculate the lodestar amount, the court also must determine a reasonable hourly rate for these counsel on this case. The petitioner requests a rate of $450 per hour for Mr. Catz and $270 per hour for Mr. Herbison. (Docket No. 155 at 2) The respondents have raised a number of objections to the requested hourly rates, and the court agrees that they are not justified either by the attorneys' experience or by the requirements of this case.

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[11]Some of these entries were discussed previously, *see supra*, p. 14. In addition, the attorneys recorded at least 85 hours of meetings and almost 20 hours of phone conversations with one another between June of 2000 and April of 2001, often with little or no explanation of the purpose. The attorneys also recorded more than 30 hours of work on their application for attorney's fees.

In support of his fee, Mr. Catz has submitted a declaration stating that he is an attorney in good standing with the bar of the District of Columbia, where he was admitted in 1973. (Docket No. 155, attach., Catz Decl., para. 1) Mr. Catz also was admitted to the Nebraska bar in 1971. *Id.* Further, Mr. Catz stated that

> the hourly rate sought herein is well within the range claimed by any experienced attorney with a specialty in federal court practice with more than 31 years experience appearing before the United States Supreme Court and several United States courts, as well as a member of the impeachment defense team in the 1988-89 House and Senate impeachment proceedings of United States District Judge Alcee Lamar Hastings (S.D. Fl.), along with legal academic and scholarship on matters related to the federal judiciary.

Id., para. 3. Finally, Mr. Catz has submitted a copy of his *Curriculum Vitae* and a March 3, 1997 article from the *National Law Journal* entitled "High Court Bar's 'Inner Circle'" (in which Mr. Catz is not named as a member) and discussing the rates charged by experienced members of the United States Supreme Court bar. *Id.*, attach., Exs. A, B.

Mr. Catz does not offer any evidence about his standard hourly rate in recent years, as required by Local Rule 13(e)(3). His *Curriculum Vitae* lists no employment after 1993 other than his "Federal litigation consulting practice," which he lists as existing from 1983 to present. (Docket No. 155, attach., Catz Decl., attach., Ex. A) Mr. Catz served as a professor of law at the District of Columbia School of Law in Washington, D.C., from 1989-1993, and as a professor of law at the Cleveland-Marshall College of Law in Cleveland, Ohio, from 1978-1989. *Id.* The most recent publication listed by Mr. Catz is an article published in the Kansas University Law Review in 1992, entitled "Judicial Review of Congressional Exercise of Impeachment Powers." *Id.* Finally, Mr. Catz lists cases in which he claims to have served as counsel, including the recent cases of *Richardson v. McKnight*, 521 U.S. 399 (1997) before the United States Supreme

Court and six cases before the Sixth Circuit from 1998 to present. *Id.* However, no documentation concerning his hourly rate charged for any of these cases has been furnished.

In support of his requested fee of $270 per hour, Mr. Herbison has submitted his own declaration. (Docket No. 156, Herbison Decl.) He states that he has been licensed to practice in the State of Tennessee since October of 1987 and is a member in good standing of the bars of the Supreme Court of Tennessee, the United States Supreme Court, the Sixth Circuit Court of Appeals, and the United States District Court for the Middle District of Tennessee. *Id.*, para. 1. Mr. Herbison's practice has consisted mainly of criminal defense work, emphasizing criminal appellate work, and a significant amount of adult entertainment law. *Id.*, para. 2. Mr. Herbison claims to have "significant civil litigation experience in both state and federal courts involving, among other areas, several aspects of constitutional law." *Id.* In addition, Mr. Herbison claims that "[d]uring the most intense states of this litigation, the demands on my time were such that I could not even consider taking on any new matters." *Id.*, para. 6.

Although Mr. Herbison customarily charges a flat rate, his standard hourly rate is $180. *Id.*, para. 10. Because he is unaware of any other ICARA litigation in this jurisdiction, Mr. Herbison has submitted information on the range of hourly rates charged for family law practitioners ($100 - $325) and federal civil rights attorneys ($125-$250) in this area. *Id.*, para. 12.

As further support for the requested rates, the petitioner submits the declaration of Joseph Johnston, a Nashville lawyer with 25 years of experience in federal litigation. (Docket No. 155, attach., Declaration of Joseph H. Johnston, para. 2) Although he is unfamiliar with ICARA litigation, Mr. Johnston states that

[t]he range for hourly fees charged for federal litigation varies depending

> upon the knowledge and experience of the [attorney], and the complexity of the factual and legal issues involved in the case. This range is from $125.00 per hour for less experienced attorneys to $250.00 or more for attorneys who are very experienced and/or have superior knowledge of specialized areas of the law.

Id., para. 6.

An important consideration in determining reasonable rates for these attorneys is their experience with regard to ICARA litigation. Both Mr. Herbison and Mr. Catz concede that they had no prior experience with ICARA litigation, and their time sheets reflect that they spent a substantial amount of time on research. (Docket No. 155, attach., Catz Decl., para. 6; Docket No. 156, Herbison Decl., para. 9) Even after the hours have been reduced by 40%, the lawyers are being compensated for a substantial amount of time spent on research. A higher rate is reasonable for an attorney who possesses knowledge and experience in a specialized area, in part because the attorney does not need to devote substantial time to this basic research and understanding of the law in that area. Lower rates are charged for inexperienced attorneys, in part, because of the additional time they need to prepare a case in an area of law with which they are less familiar. Although Mr. Catz and Mr. Herbison may have many years of experience in federal litigation generally, they are inexperienced in ICARA litigation, family law, and international law, the three main areas involved in this case. Hence, rates commensurate with experience and specialization, as are the rates requested by the petitioner, are inappropriate.

Finally, both Mr. Herbison and Mr. Catz emphasize the time constraints of this litigation and the difficulty of working with a client located in a different country with a significant amount of notoriety in this area due to the events surrounding his wife's disappearance in 1996 and the subsequent legal disputes with the respondents. The petitioner argues that

> [t]he instant case was very much an 'undesireable' one from the perspective

> of the average Nashville lawyer. Simply put, thanks to the vilification and obloquy heaped upon the Petitioner by the Levines and some lapdog media, Perry March was and is a pariah in this town. That the instant counsel were willing to vigorously and diligently represent Mr. March is a significant victory for the rule of law.

(Docket No. 157 at 8) Mr. March states in his declaration that he was unable to retain local counsel, despite his efforts to do so, prior to his Illinois counsel putting him in contact with Mr. Catz, who then contacted Mr. Herbison. (Docket No. 155, attach., Declaration of Perry A. March, paras. 6-7, 12-15, 17) Some local attorneys were willing to represent Mr. March, but they required a more sizeable retainer than he was able to pay. *See id.* Given that this potentially was a fee-generating case, the reluctance to undertake representation of Mr. March without a sizeable retainer could have been due to the alleged "pariah factor."

This argument is persuasive regarding the representation by Mr. Herbison. Mr. Herbison was retained by the petitioner at the suggestion of Mr. Catz and only after several telephone conversations between the petitioner and Mr. Herbison. *See id.*, paras. 20, 22. Mr. Herbison is a local lawyer whose practice may well be affected by his representation of Mr. March, who has been the subject of extensive, and often negative, media coverage. Mr. Herbison's standard rate of $180 per hour is within the range prevailing in this community for lead counsel of his skill and experience performing this type of work. However, the undesirability of this representation does justify some increase in that rate. Therefore, the court finds that a reasonable hourly rate for Mr. Herbison's work in this case is $200.

Mr. Catz, on the other hand, has not provided his standard hourly rate in recent years, and the respondents have submitted, under seal, competent evidence establishing that Mr. Catz was unemployed from 1993 until February of 1996 (according to his own sworn admission) and only occasionally employed on a contract-type basis for several years after that. (Docket No. 170,

attach., Ex. F) In addition, Mr. Levine states in his affidavit that Mr. Catz was employed by Kentucky Legal Services from August 31, 1999 until February 25, 2000 at an annual salary of $42,000, although the respondents were unable to receive written confirmation of this fact from that organization without a subpoena. (Docket No. 172, Affidavit of Lawrence E. Levine, para. 2)[12] The petitioner did not dispute this evidence or respond to these arguments in his reply.

The majority of Mr. Catz's experience and scholarship occurred prior to 1993 and involved issues unrelated to this case. He has offered no evidence of employment since 1996 other than his consultation practice and a half dozen cases in which he claims to have participated. Clearly, a rate of $450 per hour is far outside the bounds of reasonableness under these circumstances. The time sheets reflect that Mr. Herbison performed the majority of work on the summary judgment motion, while Mr. Catz worked on motions to strike and other preliminary motions. Hence, it appears that Mr. Catz worked at an associate level on this case. Both Mr. Herbison and Mr. Johnston stated that less-experienced associates may charge between $100 and $125 per hour for comparable litigation. That range also reflects the court's own knowledge of the fees charged in this area for associate-level attorneys. Because of the time constraints involved in this case, the court will allow Mr. Catz the higher amount and initially will set his rate in this case at $125 per hour.

Unlike with Mr. Herbison, the court is not persuaded that the undesirability of this case justifies an increase in this hourly rate for Mr. Catz. Mr. Catz has offered no evidence of his

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[12]The respondents also contest Mr. Catz's statement that he was employed as a full professor at the District of Columbia School of Law until 1993. (Docket No. 170 at 7) Although the respondents have submitted evidence showing that Mr. Catz initially was terminated from his position as of June 30, 1992 (Docket No. 170, attach., Ex. F at 53), the evidence submitted also establishes that this date was extended to December 31, 1993 by agreement of Mr. Catz and the law school, *id.*

standard hourly rate in recent years, so there is no adequate basis for comparison. Mr. Catz did not serve as lead counsel in this case and, more importantly, is not a local attorney. As discussed, Mr. Catz resides in Cadiz, Kentucky, more than two hours from Nashville. It is not clear that Mr. Catz's representation of Mr. March in Nashville, Tennessee, will have any effect on his continued practice in Kentucky. Further, Mr. Catz sought out Mr. March's Illinois attorney and made himself available to assist in this litigation. Mr. Herbison, by comparison, was retained by the petitioner at the strong suggestion of Mr. Catz. Although the evidence does not establish that Mr. Catz unethically solicited this representation, he clearly became involved in this case as a result of his own efforts. Mr. Catz even stated in his declaration that he did not expect any compensation for his representation if he was unsuccessful in securing the return of Mr. March's children. Hence, the petitioner has not established that this case was undesirable for Mr. Catz personally, financially, or professionally. The reasonable rate of $125 per hour adequately compensates Mr. Catz for his work on this case. Therefore, the court will not increase Mr. Catz's hourly rate due to the undesirability of this case.

At these rates, the lodestar amount for this case is $104,839.50. Mr. Catz's full rate results in a total of $42,667.50, and he will receive $2,295 at one-half that rate for travel time. Mr. Herbison is awarded $55,524 at his full rate, plus $1,284 at one-half that rate for travel time. The attorneys are also awarded $3,069 at the paralegal rate.

6. Adjustment of Lodestar Amount

The petitioner requests an upward adjustment of the lodestar amount based on several of the *Johnson* factors. As discussed, these factors are:

(1) the time and labor required by a given case;
(2) the novelty and difficulty of the questions presented;
(3) the skill needed to perform the legal service properly;

(4) the preclusion of employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the 'undesirability' of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

Reed, 179 F.3d at 471 n.3 (citing *Johnson*, 488 F.2d at 717-19).

Many of these factors were considered by the court in determining the lodestar amount. Nonetheless, the petitioner claims that the time limitations of an ICARA case, the undesireability of this client, the time and labor required by the case, the novelty and difficulty of the questions involved, the skill required, the preclusion of other employment, the results obtained, and the skill and experience of the attorneys justify an upward adjustment.

The time constraints, the time and skill required by this case, and the skill and experience of the attorneys have been reflected in the calculation of the lodestar amount and cannot justify any upward adjustment to this amount. As the petitioner notes, attorney's fees are not recoverable under Section 11607(b)(3) unless the court orders the return of the child, so the fact that the petitioner obtained that result similarly fails to justify an upward departure. Although Mr. Herbison states in his declaration that he was unable to take on new clients during the "most intense stages of this litigation" (Docket No. 156, Herbison Decl., para. 6), that period was relatively short, and he has been adequately compensated for it in the lodestar amount.

The undesirability of the case was considered in the calculation of the lodestar amount. As a separate basis for adjusting the lodestar upward, however, the petitioner claims that "[t]he Respondents larded the record with garbage related to matters extraneous to the merits of the

ICARA case," which required increased time and effort and justifies an upward departure.[13] (Docket No. 157 at 7) The parties in this case have an understandable animosity toward one another that has often exploded into vicious, uncivil rhetoric, more often on the petitioner's part than on the respondents'. Each side argued its points vigorously and emphatically. The lodestar amount adequately reflects the increased difficulty of litigating this highly emotionally-charged case.

Finally, as the respondents have suggested, a consideration of the fees awarded in other ICARA cases is helpful to a determination of whether the lodestar amount should be adjusted further. In the few other federal cases considering an award of attorney's fees under Section 11607(b)(3), the courts have awarded substantially smaller amounts than the lodestar amount determined in this case. *See Rydder v. Rydder*, 49 F.3d 369, 373-74 (8th Cir. 1995) (reducing district court's award of $18,847.42 to $10,000 in light of Mrs. Rydder's financial circumstances); *Knigge v. Corvese*, 2001 WL 883644 (S.D.N.Y. Aug. 6, 2001) (unpublished) (awarding $44,463.60 in legal fees); *Distler v. Distler*, 26 F.Supp.2d 723, 728 (D.N.J. 1998) (awarding $6,660 in legal fees); *Freier v. Freier*, 985 F.Supp. 710, 712 (E.D. Mich. 1997) (awarding $12,112.50 in legal fees); *Berendsen v. Nichols*, 938 F.Supp. 737, 739 (D. Kan.1996) (reducing award of $5,250 by 15% to reflect limited finances of respondent); *Currier v. Currier*, 1994 WL 392606 (D. N.H. 1994) (unpublished) (awarding $14,156.18 in legal fees).

The lodestar amount already far exceeds the amount awarded in any other reported

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[13]Although the court rejects the petitioner's characterization of the respondents' arguments, he is correct that the respondents have exacerbated this litigation through the introduction of several issues not relevant to the court's decision under the ICARA. *See March*, 249 F.3d at 467 (discussing the respondents' "numerous defenses" to the petitioner's claim under the ICARA).

ICARA case. As a result, these cases do not suggest that any further adjustment of the loadstar award is necessary to make the compensation awarded here reasonable. Therefore, no further adjustment will be made, and the petitioner will be awarded attorney's fees in the amount of $105,181.50.

7. Set Off Against Probate Court Judgment

Finally, the respondents argue that any award of attorney's fees should be set off by money judgments obtained by them against the petitioner in the state courts of Tennessee and Illinois. (Docket No. 170 at 20-23) The respondents have submitted copies of the following judgments to the court:

(1) award of costs on appeal of *In re Estate of Janet Gail Levine March*, 1999 WL 140760 (Tenn. Ct. App. March 17, 1999) (unpublished), in the amount of $8,280.24;

(2) an award of $17,757 in fees and costs by the Circuit Court of Cook County, Illinois, entered on January 10, 2000, which has been satisfied, in part, by levies totaling $348.84 on the petitioner's bank accounts;

(3) a judgment by the Probate Division of the Circuit Court of Davidson County, Tennessee on April 28, 2000 on a jury award of $43,000,000 in compensatory and punitive damages resulting from the default judgment entered against the petitioner for the wrongful death of his wife, Janet March;

(4) a judgment by the Davidson County Probate Court fining the petitioner $50 per day for contempt of court from January 20, 1999 until he became compliant with the court's order and setting a sum certain of $22,300 as of May 3, 2000;

(5) a judgment by the Davidson County Probate Court on May 5, 2000 awarding $18,374 for attorney's fees and $2,340 for costs associated with the motion for a finding of contempt discussed previously and awarding $12,524 for indebtedness owed to the respondents relating to the estate of Janet March; and

(6) a judgment by the Davidson County Probate Court on June 5, 2001 finding that the petitioner still was not in compliance with the court's prior order and increasing the sum certain owed for contempt $19,800 for the 396 days between the court's prior order and May 10, 2001.

(Docket No. 172, Levine Aff., attach., Exs. A-H) The respondents also seek set off for the interest accrued on these judgments to date.

As the Supreme Court has stated, "[t]he right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'" *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 19, 116 S.Ct. 286, 289, 133 L.Ed.2d 258 (1995) (quoting *Studley v. Boylston Nat'l Bank*, 229 U.S. 523, 528, 33 S.Ct. 806, 808, 57 L.Ed. 1313 (1913)). Set off is a product of the common law, *see In re Gordon Sel-Way, Inc.*, 270 F.3d 280, 290 (6th Cir. 2001), and is generally a matter left to the discretion of the court, *see* 47 Am. Jur. 2d *Judgments* § 1031 (1995).

Because of the limited federal caselaw on the issue of set off, the court will rely on Tennessee law as a reflection of the common law. Tennessee recognizes both statutory and equitable set off. *See Raible v. Graham*, 1992 WL 91514, at *2 (Tenn. Ct. App. May 6, 1992). Under Tenn. Code Ann. § 25-1-103, "[j]udgments *of the same court* may be set off against each other on motion, *but not so as to defeat liens of attorneys* or to circumvent the exemption laws." (emphasis added). Equitable set off is broader and allows for set off of independent judgments rendered in separate actions between the parties. *See Cooper v. Potter*, 137 S.W.2d 276, 276 (Tenn. 1940), *Clift v. Martin*, 63 Tenn. 387, 1874 WL 4311, at *1 (Tenn. 1874). Nonetheless, the considerations for equitable and statutory set off are similar. *See Raible*, 1992 WL 91514, at *2. Thus, "[e]ssential to establishing a right of [setoff], are the requirements that the demands be mutual and subsisting between the same parties and that the demands be of the same grade and nature or be due in the same capacity or right . . . . Moreover, setoff will not be allowed where it will work injustice, *or where to allow it would impair or destroy the equities of third persons*." *Auton's Fine Jewelry & Bridal Center, Inc. v. Beckner's, Inc.*, 707 S.W.2d 539, 540 (Tenn. Ct.

App. 1986), *perm. to appeal denied* (March 24, 1986) (quotation marks omitted) (emphasis added). "[S]etoff is an equitable doctrine, and generally rests in the inherent authority of the court to do justice to the parties before it . . . ." *Conister Trust Ltd. v. Boating Corp. of America*, 2002 WL 389864, at *20 (Tenn. Ct. App. March 14, 2002).

Neither the parties nor the court has located any case dealing with the set off of an award of attorney's fees. Although neither of the parties dealt with the fact that the petitioner's request for an award of fees is pursuant to a fee-shifting provision in the ICARA, the court finds this to be an important consideration. The Supreme Court has found that

> Congress' purpose in adopting fee-shifting provisions was to strengthen the enforcement of selected federal laws by ensuring that private persons seeking to enforce those laws could retain competent counsel. In particular, federal fee-shifting provisions have been designed to address two related difficulties that otherwise would prevent private persons from obtaining counsel. First, many potential plaintiffs lack sufficient resources to hire attorneys. Second, many of the statutes to which Congress attached fee-shifting provisions typically will generate either no damages or only small recoveries; accordingly, plaintiffs bringing cases under these statutes cannot offer attorneys a share of a recovery sufficient to justify a standard contingent-fee arrangement. The strategy of the fee-shifting provisions is to attract competent counsel to selected federal cases by ensuring that if they prevail, counsel will receive fees commensurable with what they could obtain in other litigation.

City of Burlington v. Dague, 505 U.S. 557, 568, 112 S.Ct. 2638, 2644, 120 L.Ed.2d 449 (1992) (internal citations omitted). Allowing set-off of an award of attorney's fees would appear to undermine the purposes of the fee-shifting provision of the ICARA. This factor weighs heavily against awarding set off in this case.

The only comparable situation in Tennessee caselaw is where a party seeks to set off a judgment against it when the opposing party's attorney has a statutory or equitable charging lien against that judgment. As in this case, the question is whether the attorney's expectation of

payment for services to a party is superior to the opposing party's right to a reduction in judgment based on the outstanding legal debts of the party to him or her. *See* 7 Am. Jur. 2d *Attorneys at Law* § 352 (1997). Courts are divided on which claim has priority, and the determination often depends on a number of factors, including whether the charging lien or the opposing party's judgment arose first, whether the judgments between the parties were entered in the same case, whether the judgments arose out of the same transaction or circumstances, and whether the attorney had knowledge of a prior judgment against his or her client by the opposing party. *See* Jay M. Zitter, Annotation, *Priority Between Attorney's Charging Lien Against Judgment and Opposing Party's Right of Setoff Against Same Judgment*, 27 A.L.R.5th 764 (1995).

The respondents' judgments were entered in separate cases and arose out of different circumstances. The Probate Court case and the case before the Tennessee Court of Appeals involved the allocation of the estate of Janet March, respondents' child. The wrongful death judgment is currently on appeal before the Tennessee Court of Appeals.[14] The Illinois case related to the Levines' request for grandparent visitation with the minor children. It is not clear that the parties to the prior cases were involved in the same capacity as in this case, as required

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[14]The respondents concede that the petitioner has appealed the judgment awarding $43 million in damages on the wrongful death claim to the Tennessee Court of Appeals and that oral argument was heard on this appeal on February 15, 2002. (Docket No. 172, Levine Aff., para. 3(C)) However, the respondents argue that this judgment is currently due and owing because the petitioner did not obtain a stay of the judgment or post a bond to appeal the judgment pursuant to Tenn. R. Civ. P. 62. *Id.* Although the Probate Court judgment may be enforceable due to the petitioner's failure to obtain a stay pending appeal, the judgment cannot be considered final where it is currently on appeal in the state courts.

for set off.[15] *See Auton's Fine Jewelry & Bridal Center*, 707 S.W.2d at 540. In the appeal before the Tennessee Court of Appeals, the Levines acted in their capacity as next friends of Janet March. *See In re Estate of Janet Gail Levine March*, 1999 WL 140760 (Tenn. Ct. App. March 17, 1999). Each of the judgments was entered prior to the commencement of this action, and the respondents claim that "[w]ithout a doubt, Robert Catz and John Herbison knew of these judgments against Perry March as they entered this engagement." (Docket No. 170 at 21) However, the evidence submitted in support of this argument relates solely to the Probate Court judgments. *See id.*

The Tennessee Supreme Court has held that "the better and more equitable rule is the one that subordinates the right of set-off of independent judgments, rendered in different suits, growing out of different causes of action, to the attorney's lien or claim for services rendered in the particular suit . . . ." *Roberts v. Mitchell*, 29 S.W. 5, 5 (Tenn. 1895). Both this rule and the purposes behind the fee-shifting provisions in federal statutes recognize the importance of securing compensation for services performed by attorneys. Allowing set off of an award of attorney's fees would undermine that security.

The unique facts of this case and the state and federal courts' concern with securing payment for legal services weigh against awarding set off of the award of attorney's fees in this

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[15]With regard to the contempt fines issued by the Tennessee Probate Court, it is not clear that the fines should be paid to the Levines. In a May 3, 2000 Order, the Probate Court set a fine of $50 per day for "criminal contempt" until Mr. March complied with the prior Order of the court. (Docket No. 172, Levine Aff., attach., Ex. F) The court instructed the Clerk of the Court to "take whatever action is legally appropriate to enforce said fine . . . ." *Id.* When the Levines returned to the court one year later, they characterized the prior Order as awarding the penalty to them and requested that the court establish a new sum certain of the fine due. (Docket No. 172, Levine Aff., attach., Ex. H) The Probate Court, perhaps inadvertently, signed this Order, thereby recharacterizing the prior Order as having awarded the fine to be paid to the Levines. *Id.*

case.[16] However, there are two judgments that bear special consideration. In the Illinois Circuit Court judgment and the May 5, 2000 Tennessee Probate Court judgment, the courts awarded the Levines attorney's fees in the amounts of $17,757[17] and $18,374, respectively, to be paid by the petitioner. (Docket No. 172, Levine Aff., attach., Exs. D, G) Hence, the respondents have judgments for attorney's fees to be paid by the petitioner, and the petitioner is being awarded attorney's fees to be paid by the respondent. In both cases, the awards inure to the benefit of the attorneys who provided services to the parties. Thus, the concerns relating to setting off other judgments against the petitioner's award are not present in this situation. Instead, the equities weigh in favor of allowing set off of these judgments. Therefore, the court will allow these judgments for attorney's fees, and the interest accrued thereon, to be set off against the award in

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[16]The wrongful death judgment involves additional issues that weigh against set off. The petitioner claims that "[t]his claim to setoff puts squarely in issue whether that Probate Court judgment, which was based on a finding of liability by default as a discovery sanction, is void for having been obtained in violation of constitutional due process." (Docket No. 190 at 16) In its opinion affirming this court's grant of summary judgment in favor of the petitioner, the Sixth Circuit Court of Appeals questioned the circumstances of the entrance of the default judgment, but that Court refrained from addressing either the constitutional validity or the substantive merits of that judgment. *See March*, 249 F.3d at 471-72.

Although this is a collateral attack on the wrongful death judgment, the court is persuaded that it is not barred from addressing this issue by the *Rooker-Feldman* doctrine. *See Catz v. Chalker*, 142 F.3d 279 (6th Cir. 1998), *amended on denial of reh'g*, 243 F.3d 234 (6th Cir. Feb. 13, 2001) (allowing collateral attack on state court judgment on due process grounds). However, a federal court may abstain from exercising jurisdiction over a claim where there are concurrent state proceedings. *See PaineWebber, Inc. v. Cohen*, 276 F.3d 197, 206-207 (6th Cir. 2001), *reh'g and reh'g en banc denied* (Feb. 18, 2002) (discussing factors for *Colorado River* abstention).

As noted, whether to grant set off is an equitable decision in the discretion of the court. This fact and the existence of the ongoing state court proceedings lead the court to conclude that the proper approach in this case is to decline set off on the basis of the Probate Court wrongful death judgment and, thereby, to refrain from addressing the merits of the petitioner's collateral attack on that judgment.

[17]This is an undifferentiated award for fees and costs, but the court presumes that the majority of the award is for attorney's fees. (Docket No. 172, Levine Aff., attach., Ex. D)

this case.

The Illinois judgment, entered January 10, 2000, has been reduced by levies of $111.12, received on August 11, 2000, and $213.03, received on August 24, 2000. Under Ill. Stat. Ch. 735 § 5/2-1303, interest accrues at 9% per annum from the date of the judgment until the judgment is satisfied. To date, the unpaid judgment has accrued $3,667.15 in interest.[18] Thus, the amount owed on this judgment, as of May 9, 2002, is $21,100. The Tennessee Probate Court judgment was entered on May 5, 2000 for $18,374.10 in attorney's fees. (Docket No. 172, Levine Aff., attach., Ex. G) Under Tenn. Code Ann. § 47-14-121, interest accrues on this judgment at a rate of 10% per annum. Thus, the judgment has accrued $3,694.96 in interest to date, for a total judgment due, as of May 9, 2002, of $22,069.06. Together, these judgments total $43,169.06. The respondents will be granted a set off of this amount against the attorney's fees awarded in this case.

Conclusion

For the reasons discussed herein, the petitioner's motion for an award of attorney's fees (Docket No. 155) will be granted, and the petitioner will be awarded $104,839.50 in reasonable attorney's fees. The respondents' request for a set off of that amount against the judgments obtained by them against the petitioner in the Tennessee and Illinois state courts will be granted as to the judgments of the Illinois Circuit Court and the Tennessee Probate Court awarding attorney's fees to the respondents in the amount of $43,169.06, including accrued interest. The respondents' request for set off will be denied as to all other judgments. Therefore, the

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[18]From January 10, 2000 through August 11, 2000, the judgment of $17,757 accrued $932.61 in interest. From August 12, 2000 through August 24, 2000, the remaining judgment of $17,645.88 accrued $56.56 in interest. From August 25, 2000 to May 9, 2002, the remaining judgment of $17,432.85 accrued $2,677.98 in interest.

petitioner's award of attorney's fees will be set off by $43,169.06, and the petitioner will be entitled to recover $61,670.44 in reasonable attorney's fees incurred in this case.

An appropriate Order shall Enter.

Enter this 9th day of May, 2002.

ALETA A. TRAUGER
United States District Judge